IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

LIBERTY MUTUAL INSURANCE CO.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-5017-CV-SW-3
	)	
FAG BEARINGS CORPORATION,	)	
	)	
Defendant.	)	

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND (2) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. BACKGROUND

A. Prior Litigation

The facts giving rise to the present lawsuit have been discussed on multiple occasions by federal and state courts in Missouri. Defendant ("FAG") operated a ball bearing parts manufacturing plant in Joplin, Missouri. In 1972 or 1973, FAG installed a degreasing system that used trichlorethylene ("TCE") to remove grease and oil from parts as they traveled on a conveyor belt.

Various environmental claims have been made against FAG, charging it with contaminating the drinking water of neighboring communities with TCE. Four of those cases were consolidated under the caption Moretz, et al. v. FAG Bearings Corp., No. 92-5070-CV-SW-8, and has been consistently referred to as "the Moretz Action." The case was eventually settled.

Before the Moretz Action settled, Liberty Mutual Insurance Company ("Liberty Mutual") filed suit seeking a declaration that it was not obligated to indemnify or defend FAG (its insured) with regard to either (1) a letter of inquiry from the Environmental

Protection Agency ("EPA") or (2) the Moretz Action. The case was styled Liberty Mutual Insurance Co. v. FAG Bearings Corp., No. 94-0241-CV-W-8, and shall hereafter be referred to as "LM I". Like the Moretz Action, LM I was assigned to the Honorable Joseph E. Stevens, Jr., late a judge of this Court. At issue was application of the following pollution-exclusion clause from the insurance policies:

> This policy does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

In particular, the focus of LM I was whether FAG's releases of TCE were "sudden and accidental."

Approximately six months after LM I was filed, a claim was filed by another nearby resident against FAG in state court; this has been referred to as "the Lewis Action." In December 1995, FAG filed suit against several neighboring businesses, alleging they were responsible for or contributed to the TCE contamination and seeking contribution from them. This case, captioned FAG Bearings Corp. v. Gulf States Paper Co., No. 95-5081-CV-SW-8 (hereinafter "Gulf States") was also assigned to Judge Stevens.

Judge Stevens issued his ruling in LM I on May 14, 1996, before the Lewis Action went to trial. In summary, Judge Stevens ruled that Liberty Mutual (1) was not obligated to indemnify FAG in the Moretz Action and (2) was obligated to defend FAG in the Moretz Action until the date of Judge Stevens' judgment in LM I, at which time Liberty Mutual's obligation terminated. Judge Stevens dismissed the claim regarding the EPA's letter without prejudice because it was not discussed in the parties' cross-motions for summary judgment and because the EPA "turned over to the Missouri Department of Natural Resources the responsibility for investigating the potential groundwater

contamination near Joplin, Missouri." LM I, No. 94-0241-CV-W-8, slip op. at 7 n.2 (W.D. Mo. May 14, 1996).

FAG filed two Motions to Alter and Amend the Judgment; the motions were denied on January 13, 1997. One of the issues FAG raised was a request that Judge Stevens clarify Liberty Mutual's obligation with respect to other lawsuits, including particularly the Lewis Action and Black v. FAG Bearings Corp., ("the Black Action"), which had recently been filed in Newton County (Missouri) Circuit Court. One of FAG's arguments contended that the Lewis Action was different from the Moretz Action in that the claims in the Lewis Action were not limited to TCE contamination. In denying the motions, Judge Stevens reiterated his intent that his May 14, 1996 Order not conclusively address Liberty Mutual's obligation in other potential lawsuits. This was an obvious reference to the Lewis and Black Actions, as well as any other claims that might be filed in the future. The January 13 Order specifically adopted "the reasons stated in plaintiff's June 21, 1996 Suggestions in Opposition," wherein Liberty Mutual argued that the substance of the claims made by potential tort victims other than those involved in the Moretz Action were not in the record or otherwise before Judge Stevens, so there was no way for Judge Stevens to determine whether those unspecified claims were or were not covered by the policy.

On April 28, 1997, FAG filed a motion for relief under Rule 60(b), contending that newly discovered evidence disclosed new sources of TCE. The motion did not mention the cutting of a pipe in 1983 or 1984 that supposedly resulted in the release of TCE; the importance of this observation will become clearer later in this Order. Judge Stevens denied the motion on May 30, 1997, holding that (1) FAG could have discovered the evidence if it had been diligent, (2) the "new" evidence was not material, and (3) the "new" evidence would not have resulted in a different outcome. In fact, Judge Stevens characterized the motion as "patently meritless" and "border[ing] on the absurd." The Eight Circuit affirmed both the judgment and the denial of FAG's post-judgment motions. Liberty Mutual Ins. Co. v. FAG Bearings Corp., 153 F.3d 919 (8th Cir. 1998).

On September 30, 1998, Judge Stevens issued an order in Gulf States. To charitably describe his order, Judge Stevens excoriated FAG for, *inter alia*, (1) engaging experts to support a particular hypothesis, not to determine the true state of matters on its property, (2) failing to provide experts with all the information at its disposal in an attempt to dictate their conclusions, (3) "fraudulently assert[ing] that it was not responsible for any contamination at its property," (4) failing to cooperate fully in the investigation into the existence of and its responsibility for TCE contamination, (5) "knowingly misrepresent[ing] the existence of a document retention policy" and other discovery violations, and (perhaps most seriously), (6) relying on testimony and advancing theories and arguments it knew to be false. His order also criticized FAG's penchant for continuously changing its explanation for the existence of TCE on its property as each theory it advanced was debunked or as otherwise necessary to pursue its litigation goals. Included among Judge Stevens' findings were the following:

- Approximately 12,000 to 25,000 gallons of TCE was released through "still bottoms," waste, spills, leaks, overflowing tanks, and incidental use of TCE. Gulf States, slip op. at 8-11.
- Documents FAG submitted to MDNR revealed that FAG released 6,750 gallons of TCE in 1973 alone. Gulf States, slip op. at 12.
- "TCE or TCE-related chemicals were detected in at least 36 different locations across the FAG facility during . . . investigations at FAG's facility from 1991 to 1996." Gulf States, slip op. at 21.
- The highest levels of contamination are found at locations where TCE was intentionally dumped by FAG's employees. Gulf States, slip op. at 22-23.
- The "trail" (or plume) of contamination runs from these locations directly to residential wells to the south of FAG's property. Gulf States, slip op. at 23-24.

Judge Stevens' order has been appealed; oral argument was set to occur in May 2002 but has recently been postponed.

Meanwhile, a jury awarded the plaintiff in the Lewis Action $716,000 in actual damages and $1.25 million in punitive damages. The award of actual damages was

affirmed on appeal, but the award of punitive damages was vacated. Lewis v. FAG Bearings Co., 5 S.W.2d 579 (Mo. Ct. App. 1999). A review of that opinion reveals that the only contaminant discussed at trial was TCE. The Missouri Court of Appeals briefly summarized the evidence demonstrating how FAG released TCE into the environment:

> In this case, there was evidence that Defendant knew of leaks of TCE during the years that it used the chemical. In fact, Defendant disposed of TCE on portions of its property which generally sloped towards Silver Creek during a period of time prior to Plaintiff moving to that area. The individual in charge of disposing of the TCE testified that Defendant stopped disposing of it on the ground and started storing it in barrels about the time the Environmental Protection Agency ("EPA") started issuing regulations concerning the chemical. The evidence indicated that, although he made his supervisor aware that the barrels were leaking, they remained on Defendant's property for over a year. Defendant stopped using TCE in 1982 when it no longer conducted the manufacturing processes that used the chemical.

5 S.W.3d at 581-82.

In April 1998, FAG entered a consent judgment with the EPA to reimburse the EPA for its previously-incurred costs. In December 1998, FAG entered an Abatement Order on Consent with the Missouri Department of Natural Resources ("MDNR"), requiring it to conduct an investigation and remediation on its Joplin property. In October 1999, another private action – Hughes v. FAG Bearings Corp. -- was filed in Jasper County (Missouri) Circuit Court. The case is (apparently) still pending.

B. The Instant Lawsuit

Liberty Mutual initiated this case in March 1999. Count I seeks a declaration that Liberty Mutual is not obligated to provide coverage or defense for the Lewis Action, the EPA's inquiries and resulting consent decree, or the Black Action (Counts I through III, respectively). The Complaint also seeks a declaration that the defense costs FAG has submitted from the Lewis and Moretz Actions are excessive and/or inappropriate (Count IV). In its Amended Answer, FAG asserted counterclaims seeking a declaration that

Liberty Mutual is obligated to reimburse it for defense costs in the Lewis, Black and Hughes Actions (Count I) and with respect to the EPA and MDNR claims (Count II). FAG also seeks a declaration that Liberty Mutual must provide indemnification with respect to the two governmental actions (Count III). Finally, FAG asserts a claim for breach of contract (Count IV).

Liberty Mutual seeks partial summary judgment on Counts I, II and III of its Complaint and Counts I, II and III of FAG's counterclaims. Its primary argument is that Judge Stevens' decision in LM I collaterally estops FAG from arguing that its release of TCE into the environment was "sudden and accidental." FAG seeks partial summary judgment regarding Liberty Mutual's duty to defend, which encompasses parts of Counts I - III of Liberty Mutual's Complaint and Counts I and II of FAG's counterclaims. FAG's primary argument against Liberty Mutual's motion relies on Judge Stevens' declaration that he was not addressing Liberty Mutual's obligations with respect to any lawsuit other than the Moretz Action, and from this seeks to introduce evidence regarding yet another potential cause of TCE contamination. With respect to the duty to defend, FAG argues that the allegations raised in the other proceedings were potentially covered by Liberty Mutual's policy, thereby giving rise to Liberty Mutual's obligation to provide a defense.

C. The "New" Theory Regarding TCE Contamination

In this lawsuit, FAG has presented yet another explanation for its release of TCE. TCE was transported via steel pipes from a tank in the service building to the plant. The steel pipes were buried underground. FAG discontinued its use of TCE in late 1981 or 1982, at which time the steel pipes were disconnected from the tank in the service building and their ends were sealed. In late 1983 or early 1984, FAG installed a new system to separate oils and other wastes from the water used as a coolant in the grinding process. FAG decided to use the old steel pipes to transport the waste coolant, and to that end hired an independent contractor to connect the TCE pipelines to the coolant system. The contractor, Stoots Construction, retained Wayne McCollum, a

licensed plumber, to assist in the project. McCollum cut one of the pipes with a saw at which point a clear liquid began to flow out of the pipe. FAG's Purchasing Manager, Charles Thornberry, was notified. He observed the situation and told the workers the liquid in the pipe was water and that it would be alright for the pipe to continue draining. McCollum re-entered the trench to make a second cut on the pipe so he could install a connecting joint. While engaged in this endeavor, he became somewhat dizzy and had to be pulled out of the trench. FAG proffers expert testimony opining that the liquid in the pipe was TCE, and this incident constitutes the "predominant source of TCE contamination at [FAG's] Facility and in the villages of Saginaw and Silver Creek." Imse Declaration, ¶ 6.[1]

II. DISCUSSION

A. Summary Judgment Standard

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See generally Williams v. City of St. Louis, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Get Away Club, Inc. v. Coleman, 969 F.2d 664 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986); Tyler v. Harper, 744 F.2d 653, 655 (8th Cir. 1984), cert. denied, 470 U.S. 1057 (1985). However, a party opposing a motion for summary judgment "may

[1]Imse's Declaration is signed and dated, but it is not notarized.

not rest upon the mere allegations or denials of the . . . pleadings, but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

A. Duty to Indemnify

1. Collateral Estoppel

The initial dispute concerns the preclusive effect of the judgment in LM I. In affirming Judge Stevens' determination that FAG's release of TCE was not sudden and accidental, the Eighth Circuit held that "[a]lthough, FAG may not have intended that such pollution occur, the district court correctly concluded that FAG did not do enough to stop the continuous recurrence of malfunction so as to prevent future releases of TCE. Because FAG was aware of the recurring malfunction, we agree that the TCE releases were not accidental." 153 F.3d at 923. FAG contends that Judge Stevens' declaration that the judgment would not determine Liberty Mutual's obligations with regard to other lawsuits means LM I is devoid of preclusive effect. FAG's arguments fail to properly acknowledge the distinctions between claim preclusion and issue preclusion.

"Under the doctrine of res judicata, also known as claim preclusion, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Costner v. URS Consultants, Inc., 153 F.3d 667, 673 (8th Cir. 1998) (quotation omitted). "The doctrine of issue preclusion, which was formerly known as collateral estoppel, provides that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in another lawsuit." Anderson v. Genuine Parts Co., 128 F.3d 1267, 1272 (8th Cir. 1997) (quotation omitted). "When the prior judgment is one entered in a diversity case, the preclusive effect of the prior judgment is determined by the preclusion rules of the forum that provided the substantive law underlying that judgment." Klipsch, Inc. v. WWR Technology, Inc., 127 F.3d 729, 733 (8th Cir. 1997); see also Hillary v. Trans World

Airlines, Inc., 123 F.3d 1041, 1043 (8th Cir. 1997); Follette v. Wal-Mart Stores, Inc., 41 F.3d 1234, 1237 (8th Cir. 1994).

The Court agrees that res judicata does not apply in this case. "For res judicata to adhere, 'four identities' must occur: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made." King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 501 (Mo. 1991) (en banc). The first identity is lacking because the relief sought is different in each case. In LM I, the relief was a declaration as to Liberty Mutual's obligations in the Moretz Action. Here, the relief sought is a declaration as to Liberty Mutual's obligations in other lawsuits, some of which did not even exist at the time of LM I. In addition, the second identity is lacking because the causes of action are, for purposes of this analysis, different. "The identity of the cause of action is defined as the underlying facts combined with the law, giving a party a right to a remedy of one form or another based thereon." State ex rel. J.E. Dunn Const. Co. v. Fairness in Const. Bd. of City of Kansas City, 960 S.W.2d 507, 514 (Mo. Ct. App. 1997) (quotations omitted). Determining Liberty Mutual's obligations necessarily turns on the allegations presented in particular lawsuits other than the Moretz Action, so the claims at issue are different. Realex Chemical Corp. v. S.C. Johnson & Son, Inc., 849 F.2d 299, 303 (8th Cir. 1988); State v. Polley, 2 S.W.3d 887, 893 (Mo. Ct. App. 1999).

This latter point not only demonstrates that res judicata is inappropriate in this case, but explains Judge Stevens' statement that his decision was not intended to determine Liberty Mutual's obligations in other lawsuits. Res judicata "applies not only to points and issues upon which the court was required by the pleadings and proof to form an opnion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." King General Contractors, 821 S.W.2d at 501. In determining Liberty Mutual's obligations in connection with the Moretz Action, Judge Stevens necessarily had to consider the allegations involved in the Moretz Action.

Despite FAG's post-judgment attempts to expand the scope of his ruling, Judge Stevens' decision was necessarily limited to the Moretz Action because he did not know what allegations were (or would be) raised in other lawsuits. Not knowing whether a plaintiff might sue FAG for injuries resulting from the release of a chemical other than TCE (as intimated by both parties' post-judgment filings), Judge Stevens could not possibly assess Liberty Mutual's obligations in unknown lawsuits. Judge Stevens simply acknowledged that his judgment could have no claim-preclusive effect over those cases when he refrained from addressing Liberty Mutual's obligations in suits other than the Moretz Action.

The Court reaches a different conclusion regarding the applicability of issue preclusion. Collateral estoppel's underlying premise is that "when an issue of ultimate fact has been determined by a valid judgment, it may not again be litigated between the same parties." King General Contractors, 821 S.W.2d at 500. In applying the doctrine, a court is to consider "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication." Id.[2] Here, only the first factor is in dispute.

FAG characterizes the issues involved in LM I quite narrowly, limiting its parameters to the airborne releases of TCE prior to 1982. It is true that this describes most of the evidence that was presented in LM I, but the legal issue presented to and decided by Judge Stevens was not so limited. A court is required to consider the issues presented to it, and here the Complaint in LM I alleged that "FAG Bearings used TCE and other hazardous substances" in its operations and that "discharges of TCE and/or other hazardous substances occurred at the Site during the time FAG Bearings owned

[2]FAG's reliance on Farmland Indus., Inc. v. Morrison-Quirk Corp., 987 F.2d 1335 (8th Cir. 1993) does not appear proper. That case dealt with the preclusive effect of a prior decision in a non-diversity action, so federal, not state law dictated the preclusive effect of the prior decision.

and/or operated it." The issue to be decided, as presented by Liberty Mutual, was not limited in either the manner or time of the releases. Based on the broad allegations of the Complaint, both parties were called upon to investigate -- and Judge Stevens was called upon to consider -- the various manners in which FAG released TCE into the environment. FAG's objective was to persuade Judge Stevens the releases were "sudden and accidental" while Liberty Mutual contended they were not. Liberty Mutual sought summary judgment by successfully contending that FAG released TCE in vapor form in a manner that was not sudden or accidental. In its responsive suggestions, FAG did not contest that it released TCE in vapor form, nor did it suggest that it released TCE in any other manner that could be characterized as sudden and accidental. FAG's tact in limiting the *evidence* presented to Judge Stevens did not change the *issue* that was before him: the issue to be decided was still the character of -- and, derivatively, the insurance coverage for -- FAG's releases of TCE. It was incumbent upon FAG to present favorable evidence demonstrating the character of those releases brought them within the policy's coverage.

That the issue in LM I involved the nature of all of FAG's TCE releases is confirmed by the Eighth Circuit's affirmance, where the Court of Appeals held that "FAG has failed to set forth any facts to support its allegations that there were other releases of TCE pollution that could have caused the contamination at issue and were 'sudden and accidental'. Therefore, we conclude that it was not clearly erroneous for the district court to conclude that the only source of TCE pollution [was] the airborne releases from the vapor recovery system." 153 F.3d at 922. That conclusion collaterally estops FAG's current attempt to present the Court with other sources of its TCE contamination.

In its Rule 60(b) motion filed on April 28, 1997, FAG – for the first time – suggested alternative sources of TCE contamination and characterized these releases as "sudden and accidental." As noted earlier, FAG did not mention the pipe McCollum cut at this time either. This was quite possibly FAG's last opportunity to present evidence on the issue at hand. The fact that it did not mention McCollum cutting open the pipe did not

narrow the issue before Judge Stevens in a manner to preserve the evidence's presentation at a later time.

The Court acknowledges that issue preclusion applies to issues that are "actually litigated." FAG relies upon its prior failures to present evidence of the ruptured pipe to argue that coverage for the ruptured pipe was not "actually litigated." The Court rejects FAG's reasoning because issues that are litigated are not necessarily co-extensive with the evidence presented. Otherwise, collateral estoppel could never apply; the losing party need only (as FAG has done here) contend that some piece of evidence relevant to the previously-decided issue was not presented, and for that reason a new and different issue is at hand. This results (as demonstrated by this case) in the very piecemeal, never-ending litigation that issue preclusion is supposed to prevent.

The issue decided by Judge Stevens in LM I was whether FAG's release of TCE was or was not sudden and accidental within the meaning of the insurance policy. FAG's possession of previously unpresented evidence[3] that might bear on the issue does not permit FAG to bypass the preclusive effect of Judge Stevens' decision.[4]

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[3]FAG has gone to some length to suggest that it was not aware of the TCE spilled from the pipe. E.g., Document No. 72 at 25-28. Without recounting FAG's explanation, and assuming the existence of a "newly discovered evidence" exception to collateral estoppel, the Court observes that FAG's explanation completely fails to acknowledge that it possessed knowledge of the events giving rise to this allegedly "new" source of contamination at the time they occurred – and well before LM I and the Moretz Action were filed. The fact that retained experts or lawyers were not informed or did not investigate the information until much later does not bestow "newness" upon the evidence.

It is also worth noting that FAG did not mention this incident in the Gulf States litigation. The Court wonders whether FAG's insistence that groundwater contamination was caused by the release from the sawed pipe was (or will be) brought to the Eighth Circuit's attention in the context of the Gulf States appeal.

[4]With respect to the Lewis Action, it must be remembered that evidence of the pipe-cutting incident was not presented at trial; the jury found that other releases of TCE caused the plaintiff's injuries. See 5 S.W.3d at 579 (describing evidence of releases). FAG cannot relitigate that issue in this forum by arguing the plaintiff's damages were really caused by the TCE released in 1983/84.

2. "Sudden and Accidental"

Even if the sawed pipe incident could be considered, the Court would still hold that coverage does not exist. "The pollution exclusion denies coverage unless the discharge is both sudden *and* accidental." Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 710 (8th Cir. 1992) (emphasis in original) (applying Missouri law). "[T]he plain language of the 'sudden and accidental' exception to the pollution exclusion focuses on the nature of the discharge, not on the resulting environmental damage." New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162, 1202 (3d Cir. 1991) (applying Delaware law). Thus, if a party intentionally releases a substance (or acts in a manner such that the release could be foreseen), the party's lack of specific knowledge that the substance contains a harmful pollutant does not render the release "accidental." E.g., St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1201 (1st Cir. 1994) (applying Rhode Island law); New Castle County v. Hartford Accident & Indemnity Co., 970 F.2d 1267, 1269 (3d Cir. 1992) (applying Delaware law); Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 957 F.2d 1153, 1157 (4th Cir.), cert. denied, 506 U.S. 824 (1992) (interpreting New Jersey law); American Motorists Ins. Co. v. General Host Corp., 946 F.2d 1482, 1486 (10th Cir. 1991), vacated in part on other grounds, 946 F.2d 1489 (10th Cir. 1991) (collecting cases to interpret Kansas law); EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co., 905 F.2d 8, 11 (2d Cir. 1990) (applying New York law). This is because the term "accidental" modifies the act of discharge or release and is defined to "mean that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual and unforeseen." Aetna Cas. & Sur., 968 F.2d at 710 (quotation omitted); see also SnyderGeneral Corp. v. Continental Ins. Co., 133 F.3d 373, 377 (5th Cir. 1998) (applying Minnesota law); Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co., 76 F.3d 89, 92 (5th Cir. 1996) (applying Texas law); Macklenburg-Duncan Co. v. Aetna Cas. & Sur. Co., 71 F.3d 1526, 1530-31 (10th Cir. 1995) (applying Oklahoma law); Harrow Prods, Inc. v. Liberty Mut. Ins. Co., 64 F.3d 1015, 1020 (6th Cir. 1995) (applying Michigan law); Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40

F.3d 146, 152 (7th Cir. 1994) (applying Indiana law); Warwick Dyeing Corp., 21 F.3d at 1201.

There is little doubt that the event in question involves the "discharge, dispersal, release or escape" of "toxic chemicals, . . . contaminants or pollutants" within the meaning of the pollution exclusion clause. The record is also replete with evidence demonstrating that much of the "discharge, dispersal, release or escape" was not "sudden and accidental." FAG contends the singular event in 1983 or 1984 (the record does not specify when it occurred) was sudden and accidental, but its citations to the record do not substantiate this point. Accepting that the release from the pipe was "sudden" in that it occurred abruptly or suddenly and not gradually, cf. Aetna Casualty, 968 F.2d at 710, the Court holds that there is no indication that the release was "accidental" as that term has been defined in the case law cited above.

FAG employed a system of two pipelines through which TCE (1) was pumped from a service building to the plant for use and (2) returned via gravity back to the service building. When FAG discontinued its use of TCE, the lines were disconnected and sealed. Years later, when the pipes were intentionally cut open at FAG's direction, TCE spilled forth from within. This was not an accident; that TCE was inside of a pipe that had been used to transport TCE for nearly a decade -- and flowed out when the sealed pipe was cut with a saw -- cannot be considered unforeseeable or unexpected. Moreover, once it was discovered that *something* was in the pipe, FAG (through its agents) indicated that the substance was merely water and should be allowed to leave the pipe, at which point TCE continued flowing from the pipe for approximately two more hours. McCollum Depo. at 21. Keeping in mind that the proper focus is on the discharge and not FAG's intent to harm or pollute, from that moment forward the discharge was intentional and not accidental.[5]

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[5]This point has additional significance. Even if the initial release could be characterized as accidental, this should not render FAG's decision to allow the release to continue for two more hours "accidental," for to do so would be tantamount to allowing the tail to wag the dog. The sequence should be considered in its entirety to ascertain

C. Duty to Defend

An insurer's obligation to defend its insured is broader than its duty to indemnify its insured. E.g., McCormack Baron Mgt. Servs., Inc. v. American Guarantee & Liability Ins. Co., 989 S.W.2d 168, 170 (Mo. 1999) (en banc). "The duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case and is not dependant on the probable liability to pay based on the facts ascertained through trial. The duty to defend is determined by comparing the language of the insurance policy with the allegations in the complaint." Id. (quotation omitted). "[T]he duty to defend is triggered if there are facts that could potentially bring the underlying claim within coverage. Furthermore, any uncertainty as to the policy's coverage should be decided in favor the insured." Liberty Mutual, 153 F.3d at 924.

1. The Lewis Action

Liberty Mutual has defended FAG in the Lewis Action and reserved its right to deny coverage. In this case it seeks a declaration that (1) it need not provide any further defense and (2) some of the bills and expenses submitted by FAG are not reasonable or are not related to defense of the Lewis Action. Liberty Mutual did not seek summary judgment on these claims, so the Court need not address these issues further. For its part, FAG seeks a declaration that Liberty Mutual was obligated to provide for the entire defense in the Lewis Action. Litigation in that case concluded in December 1999, when the Missouri Supreme Court denied transfer of the case from the Missouri Court of Appeals. It is quite clear that a duty to defend existed when the Lewis Action was first

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its true nature. Therefore, even if the Court's analysis about the initial release following McCollum's cutting of the pipe is incorrect, the entire sequence of events demonstrates that the release of TCE was at least foreseeable and at worst intentional – but not accidental.

filed because "Liberty [Mutual] remained obligated to defend FAG so long as there remained any question as to whether the underlying claims were covered by the policies," which question was not resolved until Judge Stevens issued his ruling on the matter. Liberty Mutual, 153 F.3d at 924. The Lewis Action's Petition raised claims based upon contamination by "volatile organic chemicals," or "VOCs." The Petition is not limited to a claim regarding TCE, so it initially provides no basis for conclusively determining that the pollution exclusion clause applies. Certainly, at some point during the lawsuit it became clear that the plaintiff's theory focused exclusively on TCE. Judge Stevens' decision in LM I was also issued after the Lewis Action was filed. Liberty Mutual's duty to defend ended after both (1) it was established that the case involved TCE only and (2) Judge Stevens issued his decision. The Court knows when Judge Stevens issued his decision (May 14, 1996) but the record does not reflect when the Lewis Action focused exclusively on TCE contamination. Accordingly, the Court cannot presently declare when Liberty Mutual's duty to defend ended.

2. The Hughes Action

The Petition in the Hughes Action does not clearly establish the pollutant that is alleged to have caused the plaintiffs' injuries. Much of the Petition discusses TCE specifically, but there are indications that other chemicals may be at issue. In paragraph 21, the plaintiffs allege that FAG "purchased, utilized and disposed of solvents and degreasers containing volatile organic chemicals ("VOCs"), many of which are toxic and probable human carcinogens. One such VOC which is particularly relevant to this cause is a chemical degreaser called Trichlor (TCE)." Paragraph 27 specifies certain instances of "VOC and TCE contamination in Silver Creek Village" and some of the ensuing subparagraphs discuss only TCE while others discuss unspecified VOCs. Still other subparagraphs discuss "VOCs and TCE." The wording of these contentions suggests a possible distinction between VOCs and TCE. In light of the breadth of the duty to defend and the obligation to construe matters in favor of the existence of the duty, the Court

concludes that the Petition in the Hughes Action contains allegations that were arguably covered by the insurance policy.

It may be that further development of the facts demonstrated the claims in the Hughes Action were predicated solely upon TCE. Consequently, all the Court can determine at this juncture is that a duty to defend arose when the Hughes Action was filed. The Court cannot presently determine whether that duty still exists or, if it does not, how long it lasted.

3. The Black Action

The Black Action's Petition specifies that all claims arise from TCE contamination. However, at the time the Black Action was filed (April 1, 1996) Judge Stevens had not yet determined that the TCE releases were not sudden and accidental. Thus, consistent with the holding and affirmance in LM I, Liberty Mutual was obligated to provide a defense in the Black Action until May 14, 1996. The parties have not provided any basis for making any further rulings with respect to this issue.

4. Administrative Claims

The claims by MDNR and EPA present a different issue because neither governmental agency filed a lawsuit. This is significant because the policy declared that Liberty Mutual had a duty to defend "any suit against the insured seeking damages . . . ." In Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 488 U.S. 821 (1988) ("NEPACCO"), the Eighth Circuit held that under Missouri law the term "damages" in insurance policies did not include environmental clean-up costs required under CERCLA and its state counterparts. Nine years later, the Missouri Supreme Court ruled to the contrary, see Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505, 509 (Mo. 1997) (en banc); inasmuch as the issue is one of state law, Farmland Industries controls. Cf. Lindsay Mfg. Co. v. Hartford Acc.

& Indem. Co., 118 F.3d 1263, 1269 (8th Cir. 1997) (acknowledging that "the Supreme Court of Missouri concluded that NEPACCO had incorrectly stated Missouri law"). Thus, the cleanup costs would qualify as damages (if, of course, the pollution exclusion did not apply).

The critical question is whether the agencies' demands were "suits." The Court concludes they were not. The words in an insurance contract are to be given their ordinary, common meaning, and it is only when a particular term is ambiguous that it is to be construed against the insurer. E.g., United Fire & Cas. Co. v. Gravette, 182 F.3d 649, 654-55 (8th Cir. 1999); American Family Mut. Ins. Co. v. Van Gerpen, 151 F.3d 886, 887-88 (8th Cir. 1998). The word "suit" has a particular, unambiguous meaning. According to Black's Law Dictionary, the word is "[a] generic term, of comprehensive signfication, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity." The American Heritage Dictionary of the English Language (3d edition) defines the term (in the meaning that is relevant to the issues at hand) as "[a] court proceeding to recover a right or claim." The word must be differentiated from the word "claim," which has a broader meaning. Black's Law Dictionary defines the word "claim" (as a noun) to mean "[a] cause of action" and "[d]emand for money or property as of right, *e.g.* insurance claim." The reader is later directed to consult the definition for "Cause of action," which Black's Law Dictionary defines as "[t]he fact or facts which give a person a right to judicial redress or relief against another." The American Heritage Dictionary defines the word "claim" to mean "[a] basis for demanding something; a title or right." As a verb, the word means "[t]o demand or ask for as one own's due; assert one's right to." Thus, it can be seen that a "suit" is something narrower than a "claim," and the outcome of this case would be different had the policy obligated Liberty Mutual to defend FAG from claims. However, the obligation to defend arises only in "suits," and the meaning of the term is unambiguous: demands, allegations and threats to sue are not suits.

The Eighth Circuit reached the same conclusion, holding that "[a]lthough it is a close question, in the light of the requirement of Missouri law that the terms of an insurance contract be given their plain and ordinary meaning, we conclude that the district court did not err in ruling that the demand letters did not constitute suits for damages within the meaning of Missouri law." Aetna Casualty, 968 F.2d at 714. FAG contends this aspect of the case is no longer viable because it relied upon NEPACCO, which was abrogated by the Missouri Supreme Court. The Aetna Casualty Court acknowledged that NEPACCO "strongly supports" its conclusion about the meaning of the word "suit," but Aetna Casualty's viability does not depend upon NEPACCO. Aetna Casualty focuses upon an analysis that is independent of NEPACCO (and similar to that discussed in the preceding paragraph). The opinion's reference to NEPACCO is undoubtedly intended to observe the anomaly in a contrary result: assuming NEPACCO was good law (as Aetna Casualty did), a contrary holding on the scope of the duty to defend would require an insurer to provide a defense in a proceeding for which it would not have a duty to indemnify. This possibility is foreclosed by the Missouri Supreme Court's decision in Farmland Industries, but it does not impinge the true rationale for Aetna Casualty's conclusion. This holding remains good law and further reinforces the Court's decision that the demands from EPA and MDNR were not suits, and Liberty Mutual was not obligated to provide a defense against them.

III. CONCLUSION

Consistent with the decisions discussed above, it is ordered that (1) Liberty Mutual's Motion for Partial Summary Judgment (Doc. # 44) is granted and (2) FAG's Motion for Partial Summary Judgment (Doc. # 42) is granted in part and denied in part. More specifically, the Court rules as follows:

1. Judgment is granted in favor of Liberty Mutual on Count I of its Complaint insofar as it addresses the duty to indemnify in the Lewis Action; it is hereby declared

that Liberty Mutual is not obligated to indemnify FAG for the judgment in the Lewis Action.

2. Judgment is granted in favor of Liberty Mutual on Count II of its Complaint and Counts II and III of FAG's Counterclaims. It is hereby declared that Liberty Mutual is not obligated to indemnify FAG for remediation and/or clean-up expenses arising from the claim or demands asserted by the Environmental Protection Agency or the Missouri Department of Natural Resources. It is also declared that Liberty Mutual has no obligation to provide a defense in these matters.

3. Judgment is granted in favor of Liberty Mutual on Count III of its Complaint insofar as it addresses the duty to indemnify in the Black Action; it is hereby declared that Liberty Mutual is not obligated to indemnify FAG for the judgment awarded (or settlement reached) in the Black Action.

4. Judgment is granted in favor of FAG on Count I of its Counterclaims and on Counts I and III of Liberty Mutual's Complaint in part. It is hereby declared that Liberty Mutual was obligated to provide a defense in the Lewis, Black, and Hughes Actions, as specified below:

    a. With respect to the Lewis Action, Liberty Mutual's duty to defend existed until both (1) it was established both that the case involved TCE only and (2) Judge Stevens issued his decision on May 14, 1996.

    b. With respect to the Black Action, Liberty Mutual's duty to defend existed from April 1, 1996 until May 14, 1996.

    c. With respect to the Hughes Action, Liberty Mutual's duty to defend existed until it was established that the case involved TCE only; the case was filed after May 14, 1996, so by that time it had been established that Liberty Mutual had no duty to defend suits involving the release of TCE.

The Court lacks sufficient information to further define the temporal scope of Liberty Mutual's duty to defend or establish the monetary value of that duty.

5. No judgment is rendered with respect to Count IV of Liberty Mutual's Complaint or Count IV of FAG's Counterclaims.

IT IS SO ORDERED.

/s/ Ortrie D. Smith

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: May 21, 2001